Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the Bell Atlantic Telephone Companies for Forbearance from Regulation As a Dominant Carrier in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont; And Virginia	)	CC Docket No. 99-24

COMMENTS OF NEXTLINK COMMUNICATIONS, INC.

NEXTLINK Communications, Inc. ("NEXTLINK") respectfully submits its Comments in opposition to the above-captioned Petition.[1] NEXTLINK is a national, facilities-based provider of competitive telecommunications services that currently operates twenty-two (22) high-capacity, fiber optic networks providing switched local and long-distance services in thirty-six (36) markets in fourteen (14) states. NEXTLINK is a direct competitor of Bell Atlantic in several states identified in the instant petition and therefore, has a substantial interest in the outcome of this proceeding.

I. Introduction

NEXTLINK opposes Bell Atlantic's attempt to obtain premature pricing flexibility outside of the Commission's comprehensive rulemaking on access charge reform.[2] In its

[1] See Petition of Bell Atlantic Companies for Forbearance from Regulation as a Dominant Carrier in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont and Virginia, filed January 20, 1999 ("Petition").

[2] Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Service Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354 (1996) ("Access Charge Reform NPRM").

petition, Bell Atlantic requests that the Commission forbear from rate regulation and tariff rules for Bell Atlantic's provision of special access services in twelve states.[3] Bell Atlantic's request for forbearance rests on its claim that Bell Atlantic no longer possesses market power in the provision of special access services. Bell Atlantic's petition is insufficient to demonstrate its overreaching claims. The petition is based on a flawed study that fails to provide sufficient supporting evidence for Bell Atlantic's claims, and therefore the Commission cannot rely upon Bell Atlantic's analysis.

Every Bell Operating Company ("BOC"), save one, has filed at least one petition requesting forbearance from dominant carrier regulations for the provision of special access services.[4] All of these petitions present nearly identical arguments based on the same flawed logic and the same suspect underlying factual evidence.[5] Bell Atlantic and the other BOCs are trying to gain as many "bites at the apple" as possible. NEXTLINK urges the Commission to immediately dismiss all of the petitions for forbearance and instead address these issues in their proper forum, the Commission's Access Charge Reform docket.

Bell Atlantic's petition offers unsupportable assertions concerning Bell Atlantic's market power and the state of competition in its incumbent local markets based on dubious and insufficient factual evidence. Although CLECs have made major investments in alternative facilities in response to the Commission's market-based approach to access charge reform, the picture of robust competition painted by Bell Atlantic's petition simply does not yet exist. Bell

---

[3] Petition at 1-3. Bell Atlantic states further that the Commission should forbear from applying the rate structure rules in Part 69 and the rate level rules in Part 61 for Bell Atlantic's special access services. Bell Atlantic also states that the Commission should forbear from applying its tariff filing rules so that Bell Atlantic can file tariffs on one days' notice without cost support or other supporting documentation. Id.

[4] See e.g., Petition of Ameritech For Forbearance From Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA, filed February 5, 1999 ("Ameritech Petition"); Petition of the SBC Companies for Forbearance, filed December 7, 1998 ("SBC Petition"); US WEST Communications, Inc. For Forbearance, filed December 7, 1998 ("US WEST Seattle Petition"); and US WEST Communications, Inc. For Forbearance, filed August 24, 1998 ("US WEST Phoenix Petition").

[5] Every petition for forbearance related to incumbents' provision of special access services submitted to date relies on a "study" conducted by the same firm, Quality Services, Inc.

Atlantic cannot demonstrate in any reasonable fashion that it does not continue to possess overwhelming market power in the eleven (11) markets identified in its petition.[6] Furthermore, although Bell Atlantic's petition attempts to downplay its continued failure to provide competitors with nondiscriminatory access to Bell Atlantic's local network infrastructure, as long as Bell Atlantic retains its firm chokehold on these bottleneck facilities, Bell Atlantic will continue to maintain market power in its local incumbent markets.

II. Pricing Flexibility Issues Should Not Be Considered Apart from the Access Charge Reform Docket

NEXTLINK is firmly opposed to Bell Atlantic and other BOCs' efforts to file separate petitions on pricing flexibility issues that are essentially identical to issues the Commission is currently considering in the Access Charge Reform docket. NEXTLINK urges the Commission to resolve these issues in the Access Charge Reform docket and to dismiss the multitude of "me too" petitions. As Bell Atlantic and other BOCs are well aware, the Commission recently received additional comments in the Access Charge Reform docket addressing the pricing flexibility issues raised in the instant petition.[7] Issues relating to pricing flexibility are national in scope, interrelated and should be considered by industry and regulators in the context of a comprehensive proceeding. The Commission should refuse to consider Bell Atlantic's petition for pricing flexibility outside of the Access Charge Reform docket.

III. Bell Atlantic Has Failed to Provide Sufficient Evidence Demonstrating Actual Effective Competition in its Monopoly Local Telephone Service Markets

Bell Atlantic's petition provides even less support for its definition of the relevant "market" for forbearance than the other BOC petitions that request forbearance from regulations

[6] Those states are: Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont; and Virginia.

[7] Commission Asks Parties to Update and Refresh Record for Access Charge Reform and Seeks Comment on Proposals for Access Charge Reform Pricing Flexibility, Public Notice, FCC 98-256 (rel. Oct. 5, 1998).

governing high-capacity special access services.[8] Bell Atlantic acknowledges that there may be some overlap between special access and switched access services yet it fails to provide any empirical evidence demonstrating that these services are perceived by customers as individual markets. Bell Atlantic also appears to distinguish between special access services provided to end-user customers and interexchange ("IXC") customers but does not provide empirical evidence to support its contention that they should be considered as part of one relevant market. Bell Atlantic's study also suggests that what limited competition does exist is concentrated in the market for DS-3 services, and Bell Atlantic fails to justify grouping DS-3 and DS-1 services into one relevant market. By lumping all special access services into one "market," Bell Atlantic does not present an accurate depiction of Bell Atlantic's continued control over essential bottleneck local facilities and its resulting dominance in the provision of services dependent on those bottleneck facilities.

Bell Atlantic's petition relies on the faulty assumption that it does not have market power in special access services.[9] Apparently recognizing that it continues to retain market shares well in excess of seventy (70) percent in every state covered by its petition, Bell Atlantic nowhere in its petition presents a straightforward acknowledgement of its current market share for the high capacity special access market.[10] Instead, Bell Atlantic focuses on the percentage changes or "growth" in the market shares of its competitors as the only evidence necessary for the Commission to make its determination. Bell Atlantic's statements conveniently ignore that most of its competitors only recently entered the market and therefore can increase their market share with the gain of only a minimal number of customers. Not only does Bell Atlantic fail to adequately discuss its actual market share in the several states identified in its petition, Bell Atlantic spends no effort to justify its reliance on capacity, i.e., share of DS-1 equivalents, to

[8] In fact, Bell Atlantic refers to the relevant market as "special access services" throughout its petition but only analyzes the market in terms of DS-1 and DS-3 services.

[9] Petition at 5.

[10] Bell Atlantic asserts that its competition has acquired approximately thirty (30) percent of its special access customers. Petition at 1-2.

determine market share. NEXTLINK and many other commenters have stated in the record on other BOC petitions concerning special access services, that the use of capacity as a measure of market share overstates the competitive inroads of CLECs and should be accompanied by an analysis of revenues-based shares to provide a more accurate window on the competitive level of the market.[11]

Furthermore, in the Interexchange Order, the Commission previously held that substantial competition is required before deregulation can be considered in the public interest.[12] Regardless of Bell Atlantic's efforts in its petition to manipulate market share numbers, Bell Atlantic has not lost anywhere near the level of market share that AT&T lost to competitors before the Commission removed similar nondominant regulations governing AT&T's provision of interexchange services. The current percentage of the market possessed by competitors to Bell Atlantic is simply too small to give competitors the ability to prevent the type of abuses that would occur should Bell Atlantic be granted the pricing flexibility it requests in its petition.

IV. Bell Atlantic Continues to Control Critical Bottleneck Facilities

The Commission should reject Bell Atlantic's unfounded suggestion that it is a relatively simple matter for CLECs to build additional facilities in order to reach a significantly larger portion of Bell Atlantic's customer base.[13] Bell Atlantic itself has stated many times in other

---

[11] See e.g., NEXTLINK Comments on U S WEST Seattle Petition; NEXTLINK Reply Comments to SBC Petition.

[12] See Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), recon. denied, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 46791 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 49 Fed. Reg. 11856 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd and remanded sub nom., MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[13] Petition at 6.

proceedings concerning its proposed merger with GTE that without the use of GTE's facilities, Bell Atlantic could not feasibly enter new out-of-region markets.[14] Bell Atlantic's contrary self-serving statements in the instant pleading should not be taken seriously by the Commission.

As an initial matter, NEXTLINK takes issue with Bell Atlantic's unsupported assertions regarding the costs necessary for CLECs to expand the scope of their networks.[15] Bell Atlantic fails to provide any underlying data to support its blanket assertions regarding the costs of competitive market entry. Bell Atlantic also does not consider key market development costs, such as rights-of-way fees and other building access fees, that are integral cost components for any competitor that chooses to enter a new market. These additional entry factors can increase capital expenditures and create further delays for CLECs attempting to expand the reach of their current facilities.

Although, NEXTLINK and other CLECs have taken steps to invest in and build alternative facilities in order to begin to provide competitive services, it is not credible for Bell Atlantic or any other BOC to suggest that CLECs have dislodged the incumbent BOC as the dominant service provider in the market. The inherent advantages of the ubiquitous scope and scale of Bell Atlantic's network provides Bell Atlantic with tremendous advantages that preclude new entrants from providing market discipline to Bell Atlantic's provision of services. The Commission recognized incumbents hold distinct advantages in their monopoly markets and that regulatory safeguards are necessary to protect emerging competition from "foreclosure or deterrence to market entry by new entrants."[16]

---

[14] See In the Matter of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer of Control, Application for Transfer of Control, Federal Communications Commission (Oct. 2, 1998) at 6-7; In the Matter of the Joint Application Of Bell Atlantic Corporation and GTE Corporation for Consent and Approval of a Change of Control, Joint Application, Case No. 98-1398-TP-AMT (Oct. 2, 1998) at 10.

[15] Petition at 6, Attachment B at para. 16.

[16] See In the Matter of Southwestern Bell Telephone Company, Tariff FCC No. 73, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19327 (1997) (SWBT Tariff Order").

Bell Atlantic's argument that CLECs can "address" more Bell Atlantic customers through the use of Bell Atlantic's network elements is also unreasonable. NEXTLINK's efforts to provide competitive services in the eastern United States have been delayed because of Bell Atlantic's efforts to severely limit CLECs' access to Bell Atlantic's network elements. For example, Bell Atlantic, contrary to the 1996 Act, requires CLECs to have a collocation arrangement in each and every single central office where a CLEC wants to obtain an unbundled loop.[17] NEXTLINK has requested that Bell Atlantic provide NEXTLINK with access to extended loops, but Bell Atlantic has consistently fought this request in every state. Even after a clear state commission order to provide extended loops, Bell Atlantic has continued to fight its obligations to provide this access to NEXTLINK.[18]

Moreover, Bell Atlantic offers collocation arrangements to competitors under onerous terms and conditions and at unreasonable, non-cost based rates. Even if Bell Atlantic provided collocation arrangements at reasonable rates, terms and conditions, however, the additional unjustified requirement that CLECs collocate in a central office before they can reach even a single customer connected to that office unduly burdens CLECs' ability to quickly attract and serve existing Bell Atlantic customers. Furthermore, assuming arguendo that a CLEC had the capital resources to invest in obtaining collocation cages simultaneously in every Bell Atlantic central office, there is no question Bell Atlantic could not accommodate that request.[19]

---

[17] Bell Atlantic's requirement that a CLEC only obtain unbundled network elements through collocation arrangements and Bell Atlantic's refusal to provide CLECs with access to extended loops is further evidence of Bell Atlantic's corporate policy to limit and discourage CLEC access to its network.

[18] See Bell Atlantic Pennsylvania, Inc., v. NEXTLINK Pennsylvania, Inc., et. al., in the United States District Court for the Eastern District of Pennsylvania, 99-cv-494. Bell Atlantic continues to dispute this issue even after the recent Supreme Court decision in AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___ (1999).

[19] In fact, Bell Atlantic has been unable to even comply with its obligations under the Act to provide existing CLEC requests for collocation. Since the total number of Bell Atlantic central offices is significantly greater than the current number of CLEC requests for collocation, it is reasonable to assume that Bell Atlantic would fare even worse if the number of collocation requests increased to such an amount.

Since the passage of the 1996 Act, instead of complying with its obligations under Sections 251 and 271, Bell Atlantic has concentrated its efforts to resisting compliance with the Act's market-opening requirements.[20] Only after the Commission has determined that Bell Atlantic is providing bottleneck facilities on a nondiscriminatory basis should the Commission consider seriously the ability of CLECs to use Bell Atlantic's network to provide competitive pressure on Bell Atlantic. The Commission must continue to insist on real evidence of substantial competition, including the elimination of critical barriers to entry in the BOCs' monopoly markets,[21] as prerequisites that must be met prior to any grant of pricing flexibility to the BOCs.

V. Bell Atlantic Does Not Meet the Standards for Forbearance under Section 10

If the Commission decides to address this petition on its merits, the Commission must deny the petition because Bell Atlantic has failed to meet the statutory requirements for forbearance under Section 10. The evidence in Bell Atlantic's petition alone suggests that a grant of the requested relief to Bell Atlantic would negatively impact overall consumer welfare, thwart emerging competition and completely undermine the Commission's market-based approach to access charge reform.

First, Bell Atlantic is currently regulated as a dominant carrier because it has unquestioned market power throughout its service territory. Bell Atlantic has not demonstrated that it lacks market power, regardless of how the "market" is defined, because Bell Atlantic has not shown that it has provided nondiscriminatory access to competitors to its bottleneck facilities, and furthermore, it has not shown that its competitors have taken sufficient market share to demonstrate that actual competition exists. A relaxation of dominant carrier regulation

[20] See e.g., SBC Communications v. FCC, 10 CR 571 (5th Cir. Sep. 4, 1998).

[21] Such barriers include: (1) BOC control over bottleneck facilities and abuse of that power; (2) state and local regulations inconsistent with competition; and (3) additional barriers created by entities such as building owners and utilities.

for Bell Atlantic would allow it to subsidize predatory pricing in identified markets by raising prices in other markets where Bell Atlantic is not even attempting to argue that it is not dominant.

Second, Bell Atlantic can already lower prices in response to competitors under the Commission's existing "density zone" rules. To do so, however, Bell Atlantic must lower those prices in both markets where there is some competition and those where there is none at all.[22] The Commission's existing density zone pricing rules not only enable Bell Atlantic to lower prices in response to competitive entry, but they also promote overall consumer welfare by requiring Bell Atlantic to simultaneously lower prices in markets where some competition exists as well as markets where competition has yet to arrive. The long term danger in Bell Atlantic's requested relief is that it would arm the incumbent with the capability to drive out new entrants in small pockets of emerging competition while permitting Bell Atlantic to maintain monopoly pricing in those markets where no competitive alternative exists. The BOC can engage in such predatory pricing because it has the ability to cross-subsidize anti-competitively priced service offerings with the continued revenue streams it receives from access charges in markets where competition has yet to emerge as well as from its other monopoly services, such as local exchange services. Such a result is completely contrary to the requirement of Section 10 that Bell Atlantic show that regulation is not necessary to ensure that the charges, practices, classification, or regulations by, for, or in connection with that service are just, reasonable and not unjustly or unreasonably discriminatory. Bell Atlantic's only defense to this concern is its contention that it has little ability to maintain prices well above those of its competitors and that consumers will not be harmed if its petition is granted. Bell Atlantic has completely failed to address its ability to cross-subsidize its special access services with revenue obtained from other areas and services in which it indisputably retains dominant market power.

Furthermore, a grant of Bell Atlantic's petition would harm both the short and long-term interests of consumers. Although some customers in some markets may benefit from Bell

[22] See 47 C.F.R. § 69.123.

Atlantic's ability to charge lower prices, overall consumer welfare will be decreased because Bell Atlantic will no longer have to make those rates available to all consumers in similar density zones. In the long-term, Bell Atlantic's ability to predatorily price and cross-subsidize its services in the markets at issue in the petition will destroy CLECs' ability to compete and damage the long term prospects for sustainable, irreversible competition in these markets.[23] That will only result in Bell Atlantic's unfettered ability in all markets to charge supracompetitive rates.

Finally, the Commission has clearly articulated that pricing flexibility is an interrelated part of its efforts to reform the access charge rules. In addition to the above discussed harm to consumers and competitors that is clearly not in the public interest, a grant of this petition would immediately short-circuit the Commission's current market-based approach to access charge reform and any further efforts to reform its access charge rules in the Access Charge Reform docket. The success of the Commission's market-based approach rests upon continued vigilance over dominant incumbent providers of access services. If competition has not developed to the point where markets forces can effectively control BOC pricing and other behavior, then the inherent dangers of monopoly control are still present.

VI. Conclusion

The Commission should dismiss Bell Atlantic' petition for forbearance because it is an attempt to inappropriately circumvent the Commission's comprehensive rulemaking on reform of its interstate access charge rules. If the Commission chooses to consider Bell Atlantic's petition on its merits, however, the Commission should deny Bell Atlantic's petition because it is based on flawed and misleading evidence and fails to demonstrate that Bell Atlantic lacks market power in any of the MSAs identified in its petition. Furthermore, Bell Atlantic's petition does not even address Bell Atlantic's continuing lack of compliance with the market-opening

[23] See Access Charge Reform Order at para. 266.

requirements of the 1996 Act and Bell Atlantic's resulting chokehold on local bottleneck facilities. Bell Atlantic's petition does not meet the statutory requirements for forbearance and a grant of the requested relief would be contrary to the public interest. NEXTLINK, therefore, urges the Commission to reject Bell Atlantic's petition.

Respectfully submitted,

By: _____

R. Gerard Salemme
Senior Vice President, External Affairs and
Industry Relations
Daniel Gonzalez
Director, Regulatory Affairs
NEXTLINK COMMUNICATIONS, INC.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 721-0999

Daniel M. Waggoner
Robert S. Tanner
DAVIS WRIGHT TREMAINE LLP
1155 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20036
(202) 508-6600

Counsel for NEXTLINK Communications, Inc.

March 17, 1999

CERTIFICATE OF SERVICE

I, Tracey A. Bogans, legal assistant, in the law firm of Davis Wright Tremaine LLP, do hereby certify that a copy of the aforesaid "Comments of NEXTLINK" was served on the persons specified below, by U.S. Mail, First Class Postage Prepaid, on March 18, 1999:

William E. Kennard
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Michael K. Powell
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Susan P. Ness
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036

Tamara Preiss
Federal Communications Commission
Competitive Pricing Division
1919 M Street, N.W. Room 518
Washington, DC 20554

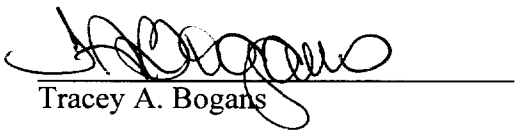
Gloria Tristani
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Harold Furchtgott-Roth
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, DC 20554

Steven Spaeth
Federal Communications Commission
Competitive Pricing Division
1919 M Street, N.W. Room 518
Washington, DC 20554

Edward Shakin
Joseph DiBella
Bell Atlantic Telephone Company
1320 North Courthouse Road
Arlington, VA 22201



Tracey A. Bogans